is further proved, That the defunct, some days after the testament was executed, delivered it to the father of Agnes Myles, and recommended it to him to take care of it. No. 71.

In point of law, the evidence of the instrumentary witnesses, improbatory of the deed, may certainly be redargued by contrary evidence. For if, upon any occasion, the instrumentary witnesses should upon oath deny their having seen the party subscribe a deed, or heard him acknowledge his subscription, the verity of the deed might still be astructed by collateral proofs; as was found in a late case, Isabel Rolland against John Rolland maltster in Culross, though that case never came to a final decision.

Observed on the Bench: That in this case *non deficit jus sed probatio.*—In the case of notaries, the greatest strictness ought to be oberved, and they ought not to be allowed to dispense with any part of the strict forms.

"The Lords found, That the testament was not regularly executed; and therefore reduced the same; and decerned."

Act. *Johnstone, Ferguson.* Alt. *Lockhart.*

J. C. *Fac. Coll. No. 222. p. 409.*

1765. *June* 21. GORDON *against* MURRAY.

No. 72.

Objected to the conveyance of a ground of debt in an adjudication, that though it was subscribed by two notaries, there were only three subscribing witnesses. The Lords sustained the objection in so far as the debt conveyed exceeded the sum of £100 Scots.

Fac. Coll.

*** This case is No. 28. p. 16817.

1767. *July* 1.

ELIZABETH and MARTHA ROLLANDS *against* RICHARD ROLLAND.

No. 73.
A deed signed by two notaries, but at different places, and before different witnesses, found not valid, nor supportable by a proof of homologation.

George Rolland having purchased some heritable subjects, took the disposition thereof "to himself and his wife in conjunct fee and life-rent, and to the heirs lawfully procreated, or to be procreated, betwixt them, in fee." After his death, Richard Rolland, his eldest son, obtained a charter of confirmation of the disposition, and a precept of *clare* from the superior, and was infeft, and died in possession of the heritage in the year 1760.

Richard Rolland, his son, succeeded to him, and, in right of his apparency, continued the possession, and uplifted the rents until the year 1764, when the tenants having refused to make any further payments, he brought an action against them.

No. 73. In that action compearance was made for Elizabeth and Martha Rollands, his aunts, who produced a sasine in their favours of two thirds of the subjects, dated March 1764, proceeding on a disposition, dated 28th September, 1750, granted by George Rolland their father, disponing the subject to him, and to Richard, their brother, equally; and thereupon they craved preference to two thirds of the rents.

The chief objection stated by Richard Rolland against the disposition and sasine produced, was, That being signed by two notaries at different times and places, and before different witnesses, it was void by the act 1579. The Lord Ordinary "repelled the defence proponed for the defenders, founded on the disposition to the tenement granted by George Rolland to them, and decerned the tenants to pay the rents to Richard Rolland."

Elizabeth and Martha Rollands reclaimed, and pleaded, That the act of Parliament 1579 having been made solely with a view to prevent forgery, it did not appear to be necessary that the subscription of the two notaries and four witnesses should be adhibited *unico contextu*, in order to authenticate the deed: The subscription of one notary and two witnesses at one place, and another notary and two witnesses, at another place, it was said, made the notaries co-notaries, and the witnesses co-testes to the same fact, which sufficiently verified it, and took off all suspicion of forgery. *2do*, It was offered to be proved, that George Rolland had often acknowleged the deed in favour of his daughters to be his deed; and it was contended, that such acknowledgement, if proved, was sufficient to remove the objection stated against it. And *3tio*, it was urged, That, as the disposition to the subject, which was trifling, was taken to the heirs of the marriage in fee, the same, by that destination, fell to be equally divided amongst the children of the marriage; and, in support of that argument, the case of Andrew Scott, determined in the year 1760, was appealed to. See APPENDIX.

Answered for Richard Rolland: That the argument used for his aunts was directly in opposition to the words of the act of Parliament 1579, and all the decisions that had ever followed upon that act. The act itself requires, that the two notaries should subscribe, and four witnesses should be present, at the same time, otherwise the writ to make no faith; and, agreeable thereto, it has always been so decided. *2do*, Upon supposition that the deed executed by George Rolland was not valid, it was answered, That a proof of his having acknowleged it to be his deed would have no effect. The law has appointed certain requisites to be observed by every person who transfers his heritage in order to make that transference valid; and if these requisites are not complied with, the deed will be good for nothing, however it is afterwards acknowledged by the granter. If a contrary doctrine was to prevail, the consequences are plain. Our whole system of law, with regard to the formality of writings, would be overthrown, which the wisdom of ages has found necessary to require in the executing of deeds of importance. And, with regard to the last argument, it was answered, That a provision of an heritable subject to the heirs of a marriage undoubtedly

carried that subject to the eldest son, as heir of the marriage, exclusive of all the other children. The distinction betwixt heirs of a marriage and children of a marriage is now well understood in our law. When an heritable subject is provided in a contract of marriage to the heir of a marriage, the law points out the eldest son to be the heir; in the other case, the maker of the deed excludes the legal succession, and the younger children are admitted to an equal share; and it was said that the case of Scott did not contradict the doctrine, because it was circumstantiate. No. 73.

"The Lords adhered."

Act. *M'Queen.* Alt. *Geo. Cockburn.*

J. S. ter. *Fac. Coll. No. 65. p.* 111.

1792. *July* 3.

TRUSTEES of GEORGE ROSS *against* SARAH AGLIANBY.

No. 74.

In deeds executed by persons who are blind, with the assistance of notaries, it is necessary, that, at the time of executing, they be read over in the hearing of the granters, before the witnesses.

Richard Lowthian, who had amassed a fortune of £70,000, died at the age of ninety. During the latter years of his life, being afflicted with blindness, he used to employ notaries in the execution of his deeds.

In this manner, in the course of ten years preceding his death, which happened in 1784, he had executed a number of settlements, the last of them dated in 1783, in favour of Sarah Algianby his wife, to whom he had been married fifty years. The notaries' docquets, it is to be remarked, without mentioning that the deeds were read over to Mr. Lowthian, ran in the usual style, thus: "De mandato prædicti Richardi Lowthian, scribere, ut asseruit, nescientis, pennamque tangentis, nos —— —— notarii-publici ac co-notarii, in præmissis specialiter requisiti, pro illo subscribimus."

He had no children; and his heirs at law were Ross his nephew, and two nieces. In the name of certain trustees, Ross instituted an action of reduction of those deeds, on various grounds, but chiefly that of an alleged essential defect in the mode of executing them, in consequence of their not being read over at the time; a circumstance which ought not only to have taken place, but should have appeared from the docquet. In support of this reason of reduction, it was

Pleaded: If a person, when possessed of sight, and able to read, subscribe, before witnesses, a deed, though not holograph, or one that is holograph, though not in their presence; the evidence of consent, essential to every deed, will be legal and complete. But if the granter be ignorant of letters, and still more if he be deprived of sight, it will avail little that a deed be produced, as having been executed by notaries at his desire, unless there be evidence afforded, that the deed was read over to him in such a manner that he was able fully to understand it. This is a plain dictate of common sense, and needs no aid from authorities, which, for the same reason, are hardly to be looked for.